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LEGISLATIVE DIVORCES AND THE FOURTEENTH AMENDMENT.

PRIOR to the adoption of the Fourteenth Amendment to the Constitution of the United States, it was the prevailing opinion of lawyers and courts that state legislatures could grant divorces *a vinculo* when the constitution of their state did not forbid, at least for causes for which they could not be granted by the courts.

Marriage was viewed as creating or entailing a legal *status*. The law produced the *status*, and the law could terminate it. The voice of the state was its law, whether pronounced by the legislative or the judicial department, so long as each acted in its proper sphere.

The history of the common law supported this doctrine. Great Britain had, during a course of centuries, granted divorces occasionally by act of Parliament. They had been confined to cases of adultery; but such a limitation was in its nature purely a matter of legislative discretion.

The Supreme Court of the United States in 1887 supported (though two of its ablest members dissented) a divorce given by one of our territorial legislatures. The law under which the territory was organized vested it with legislative jurisdiction over "all rightful subjects of legislation." English and American practice, the court said, had settled it that to grant a divorce *a vinculo* was a proper act of legislation, at least where no jurisdiction

to grant one under similar circumstances had been vested in the judicial tribunals.¹

The general current of state decisions runs in the same direction, although a few are to the contrary.²

The number of legislative divorces granted in the various states has been very large, but of late years it has been much reduced by new provisions in our state constitutions or statutes. For the five biennial sessions of the Delaware legislature, from 1889 to 1897 inclusive, it is stated in a recent book that there were over three hundred of them, the last year of the period being the most prolific, and showing a round hundred.³ Ten years later, by a statute of 1907, divorces in all cases were turned over to the courts.⁴ In Missouri, in one year, the legislature granted fifty-five divorces, although the courts had been given quite a broad divorce jurisdiction.⁵ Pennsylvania had at one time a standing legislative Committee on Divorce, which heard petitions for divorce, much as a court might. In that state the court took the explicit position that notice of a divorce proceeding pending in, or brought to, the legislature need not be given to the adverse party. The power to give relief, it said, was legislative, and so "the judicial quality of the Act is merged. Notice becomes unnecessary, because it is a law, and not a decree."⁶

It seems difficult, on principle, to treat a legislative divorce as invalid, where the legislature had previously given the courts jurisdiction over divorces for certain causes, or even exclusive jurisdiction as to such causes; and yet as valid, if the courts had received no such grants. Professor Howard, in his *History of Matrimonial Institutions*, asserts such a distinction,⁷ but his main authority for it is the divorce practice in Connecticut. As shown by him, legislative divorces were numerous in that state down to 1850. In 1843, for instance, there were thirteen; in 1847, seven;

¹ *Maynard v. Hill*, 125 U. S. 190, 205, 206, 8 Sup. Ct. 723 (1888). See, however, 1 *Bishop on Divorce*, § 661.

² *Bryson v. Bryson*, 17 Mo. 590 (1853).

³ *Keezer on Marriage and Divorce*, 418.

⁴ *Laws of Delaware*, xxiv, 621.

⁵ *Page on Divorce*, 58, note, as cited, in 1 *Bishop on Marriage and Divorce*, p. 500, note.

⁶ *Cronise v. Cronise*, 54 Pa. St. 255, 262 (1867).

⁷ II, 359

in 1848, fifteen; and in 1849, eighteen. In the latter year a different policy was adopted for the future. The Superior Court was given "sole and exclusive jurisdiction of all petitions for divorce," and several new causes of divorce were added, one being "any such misconduct of the other party as permanently destroys the happiness of the petitioner and defeats the purpose of the marriage relation."⁸ Notwithstanding this, the General Assembly, at its next session, granted a divorce, and occasionally exercised the same jurisdiction for the next sixty years. The causes of divorce were very rarely stated in the final Act. In a majority of the cases, probably, it was insanity existing previous to the marriage, but this was treated as strictly a cause of divorce, and not of a judgment of nullity. Nor had it, from 1831 (when *Starr v. Pease*, 8 Conn. 541, was decided) to 1911, been regarded as an intrusion on the judicial field for the legislature to grant such relief in any case where it deemed it proper. Each Act of divorce, if inconsistent with the Act of 1849 giving exclusive jurisdiction in divorce suits to the courts, was supported as a later law, granting exceptions from a former one.

At the time of the adoption of the Fourteenth Amendment to the Constitution of the United States, in 1868, its far-reaching scope was not generally understood or, at least, not generally admitted. The Supreme Court of the United States was at first indisposed to give it all the effect which its terms naturally called for, and, had the opinion expressed in the *Slaughter House* cases⁹ not been virtually overruled in later decisions, the amendment would have been of little avail to any but the negro. So far as the writer is aware, no court has yet been asked to consider its effect on legislative divorces.

The clause of most importance in this respect is that forbidding any state to "deny to any person within its jurisdiction the equal protection of the laws."

In *Yick Wo v. Hopkins*,¹⁰ this phrase — "the equal protection of the laws" — was defined as meaning "the protection of equal laws." This would seem to preclude a state, whose courts have gen-

⁸ Public Acts of 1849, 17.

⁹ 16 Wall. (U. S.) 36, 81 (1872).

¹⁰ 118 U. S. 356, 369, 8 Sup. Ct. 1064 (1886).

eral jurisdiction to grant divorces for certain causes, from singling out, by a special law, a particular couple who are united in the marriage relation, and divorcing them for another cause, or, indeed, for any cause. Here would be a general law for all, and a special law for two named individuals. If a man sued in court for a divorce, it could be obtained only by a decree of a judicial tribunal, before which his wife must be summoned, and where she could be heard in her own behalf. If the special law be valid, he could sue before the legislature without notifying her, and secure the divorce when she had no knowledge of the proceeding and no opportunity to appear in opposition. The *status* of no one else in the general class of married women could be varied by her exclusion from that class without her having the benefit of a judicial hearing. The *status* of the one particular woman, from whom her husband was freed by special legislative action, would be altered in a manner much less apt to secure her just rights.

The ordinary married person has by law, in almost every state, a conditional immunity from divorce. None can be granted, according to that law, save by a court. If any particular married person can be singled out by the state and freed from the bond of matrimony, without any court proceeding, the conditional immunity belonging to every other married person is denied.

The protection of equal laws cannot be enjoyed by one against whom the power of the state is exerted to alter his *status* in a particular manner not contemplated or permitted by such laws, as respects persons in general.

The guaranty in the Fourteenth Amendment against discrimination by the state is for the benefit of "any person within its jurisdiction." As a legislative divorce, if valid, operates as a law, and as the general proposition is true that laws can be made without notice to those who will be affected by them, it was the former American doctrine that such a divorce proceeding could be maintained where one party to the marriage was domiciled in the state where it was had, though the other was domiciled elsewhere and did not have notice or appear.¹¹ So far, however, as the Four-

¹¹ *Maynard v. Hill*, 125 U. S. 190, 209, 8 Sup. Ct. 723 (1888). Congress, in 1886, forbade territorial legislative divorces for the future. U. S. STAT. AT LARGE, xxiv, 170.

teenth Amendment operates on personal rights and matters of *status*, it can hardly be claimed that it protects no one who is not personally within the territory of the state. Should a state deny to such a person, who is not one of its citizens, the equal protection of its laws, by changing his *status*, both in respect to one of its citizens and to the community, it assumes to have jurisdiction over him by that very denial. If the proceeding has any force whatever, it is because of this assumption, and if a non-resident is thus swept into the *de facto* jurisdiction of a legislature, he certainly comes within the spirit of the amendment.¹²

In 1911 the legislature of Connecticut granted a divorce on the husband's petition. The wife had become incurably insane since her marriage. The divorce was not to take effect until he gave a bond, with surety for \$1500, to the town where he lived, conditioned for her partial support. The Superior Court had no power to grant divorces for the cause of supervenient insanity. The Governor returned the bill without his approval, and his veto, which was mainly based on the provisions of the Fourteenth Amendment, was sustained. Adverse reports have been made on all subsequent applications for divorces made to the legislature in 1911 and 1913.

The doctrine of *Maynard v. Hill*¹³ was explained in *Haddock v. Haddock*¹⁴ as only affirming that a legislative divorce of a domiciled citizen was valid within the jurisdiction of the government which granted it. Other states were free to recognize it as effectual or not.

It is certain that it would not be entitled to their recognition under the generally accepted rules of international private law.¹⁵

In *Maynard v. Hill*¹⁶ the effect of the Fourteenth Amendment on the states was not in question. It was a question purely of the rights of the United States, exercised through one of its political

¹² See, however, *Blake v. McClung*, 172 U. S. 239, 261, 19 Sup. Ct. 165 (1898); 176 U. S. 59, 65, 20 Sup. Ct. 307 (1900).

¹³ *Supra*.

¹⁴ 201 U. S. 562, 569, 574, 26 Sup. Ct. 525 (1906).

¹⁵ See Wharton on the Conflict of Laws, 3 ed., I, § 237, f; *Convention pour régler les Conflits de Lois et de Juridictions en Matière de Divorce et de Séparation de Corps*, Art. 7.

¹⁶ *Supra*.

agencies — a territorial government — and affecting landed property situated in the territory.

The whole drift of modern institutions is away from unconfined legislative power. The grant of legislative divorce is one of the extremist forms which it can assume. It does not belong to the social life of the twentieth century.

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NEW HAVEN.